IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 & 75-5015



JEFFERSON DOYLE,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent;*

and

RICHARD WOOD,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF OHIO TUSCARAWAS COUNTY

## BRIEF FOR THE PETITIONERS

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## OPINIONS BELOW

The judgment entries of the Supreme Court of Ohio, denying further appellate review are incorporated in the

Appendix at pages 67 and 69. The entries filed by the Court of Appeals of Ohio, Tuscarawas County, the judgments under review here, appear at pages 49 to 57, and 58 to 66, of the Appendix. The Tuscarawas County Common Pleas Court entries appear at pages 44 and 46 of the Appendix.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 11, 1975. The petitions for writ of certiorari were filed on July 2, 1975, and were granted October 6, 1975. The jurisdiction of this Court was invoked under 28 U.S.C. §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

## QUESTIONS PRESENTED

1) Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:
   a) to questions as to why he did not protest his innocence at the point of arrest, at the preliminary hearing, or at some time earlier than at the trial;
   b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;



   c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.
2) Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 2937.11

> "At the preliminary hearing, pursuant to section 2937.10 of the Revised Code, the prosecutor may, but shall not be required to, state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state, under the rules of evidence prevailing in criminal trials generally, the accused and the magistrate having full right of cross examination and the accused the right of inspection of exhibits prior to their introduction. On motion of either the state or the accused, witnesses shall be separated and not permitted in the hearing room except when called to testify."

Ohio Revised Code, Section 2937.12

> "(A) At the conclusion of the presentation of the state's case accused may move for discharge for failure of proof or may offer evidence on his own behalf. Prior to the offering of evidence on behalf of the accused, unless accused is then represented by counsel, the court or magistrate shall advise the accused:
>
> (1) That any testimony of witnesses offered by him in the proceeding may, if unfavorable in any particular, be used against him at later trial;



> (2) That accused himself may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence;
>
> (3) That he may refuse to make any statement and such refusal may not be used against him at trials;
>
> (4) That any statement he makes may be used against him at trial.

Ohio Revised Code, Section 3719.44(D):

> "No person shall sell, barter, exchange, or give away, or make offer therefor, any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code."

## STATEMENT OF THE CASE

### I

Jefferson Doyle and Richard Wood, the petitioners herein, were convicted in the Common Pleas Court of Tuscarawas County, Ohio, and were sentenced to the penitentiary for the sale of marijuana in violation of *R. C. of Ohio*, §3719.44(D). These convictions were separately appealed to the Ohio Court of Appeals, Tuscarawas County, where they were affirmed.

The Ohio Supreme Court denied further appellate review to both petitioners.

### II

The basic facts as developed in the separate trials of Doyle and Wood are pretty consistent. In essence, *Bill*

*Bonnell*, a convicted felon, with a record consisting of convictions for first degree rioting (R2 27); grand larceny (R2 28) five or six assault and battery cases (R2 56); and numerous convictions for disorderly conduct (R2 56), testified that he bought a quantity of marijuana from Jefferson Doyle.

In short, the State's case was absolutely dependent upon the testimony of Bill Bonnell. As such, his veracity and the ulterior motives behind his actions were extremely important. He had been sentenced to the Ohio Penitentiary, and was desperate to do anything to get out–even turn in his childhood friends (R2 64) in his efforts to induce the officers to come forward in his behalf at his probation hearing which was then pending (R2 32,65,66). Bonnell also admitted that he would not have testified in these cases but for the threat of prosecution, for the additional crimes he had committed, if he failed to do so (R2 69-71).

In a nutshell, Bonnell testified that he was contacted by Jefferson Doyle and they agreed to meet in Dover, Ohio, where a transaction involving ten pounds of marijuana was to be consummated. In anticipation of Doyle's arrival, Bonnell contacted the multi-county Narcotics Bureau. They, in turn, contacted the local police and various surveillance teams were set up. When Doyle came to Dover, Richard Wood was with him (R2 41). Even Bonnell conceded he did not know Wood would be with Doyle (R2 41).

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* References are indicated as follows:

To the numbered pages of the Transcript of Proceedings in the Doyle trial (R1 –).

To the numbered pages of the Transcript of Proceedings in the Wood trial (R2 –).

To the numbered pages of the Transcript of Hearing on Pretrial Motions (M –).

To the Appendix (A –).



Bonnell testified that after his conversations with Doyle in Dover, Wood rode with him in his truck. Doyle, he testified, in the meantime, went for the drugs (R2 42). They ended up in the area behind the 224 Club, in New Philadelphia, Ohio (Dover and New Philadelphia are twin cities). Here the transfer supposedly took place.

On cross examination Bonnell denied that he had staged this entire episode. In this regard, this witness specifically denied that he had tried to sell Doyle the marijuana he later turned over the the police (R2 79), and he denied having thrown the money in the car then being driven by Doyle (R2 80).

The overall importance of Bonnell's testimony centers upon the fact that he was the only person other than Jefferson Doyle and Richard Wood who was present during the alleged transaction. None of the officers who testified, save Captain Griffin, even asserted that they had seen any transfer take place. Specifically, *Kenneth Beamer*–the agent in charge of the surveillance–testified that he did not see the actual transfer or even the bag (allegedly containing the marijuana) under Bonnell's arm until after the alleged transaction had taken place (R2 155). Although Beamer testified that Detective Hobert White and Captain Griffin had told him that they had observed the transfer (M 20); Detective White testified he did not see any transfer (R2 210, M 80-83). All he [White] could really see was that something was already under Bonnell's arm when they arrived (R2 241, M 61). Further, he denied having told Beamer that he had seen the alleged transaction. More specifically, White stated that what he told Beamer was that when they arrived Bonnell was already standing beside Doyle's vehicle with a package under his arm (M 67,83).

As to *Captain Griffin*, although he could *not* see the alleged transfer when he testified at the preliminary hearing (R2 289,290), at trial he indicated that he had done so (R2 266). This he maintained despite being 200 feet away in the middle of the night, a feat that would have entailed his looking into this deserted parking lot that was surrounded by foliage. Consequently, the credibility given Captain Griffin must be viewed in light of the glaring inconsistencies in the versions he proffered while under oath at different stages of the trial.

## III

For his defense, *Richard Wood* (whose case was tried first) testified to facts showing his presence in both Dover and New Philadelphia was most fortuitous. He was at a bar in Akron, Ohio, when Vince Cercone and Jefferson Doyle came in. Upon being queried by Jeff Doyle as to his plans for the evening, Wood revealed he was going to Steubenville, Ohio, to see his daughter. Doyle then asked him if he could ride as far as New Philadelphia with him. Wood says he picked up a few personal items and a change of clothes, and Jeff picked up his wife. The plan was that he would drop Doyle and his wife off at Doyle's sister's in Sherrodsville and pick them up on the way back (R2 439-440).

Wood next testified that Doyle, after they dropped his wife off, indicated he wanted to go into town to see Bonnell (R2 440). This then brought them to Dover and to the two bars.

Inside these bars Wood says he was just "goofing off." He had a "couple of drinks or two" while Doyle and Bonnell talked (R2 441). A point was reached



where "Jeff [Doyle] said he had to go to his sister's or he had to go some place and wanted to know if he [Wood] was going along or would stay there" (R2 441).

Wood testified that his first response was that he would stay there at the bar. It was at this point Bonnell stated that he was going to meet Doyle, and told Wood to ride with him (*ibid*). They eventually ended up in the lot behind the 224 Club in New Philadelphia (R2 442), where Doyle pulled in beside them. Bonnell got out of his pickup truck, and was out of his view for "a couple of minutes" (*ibid*).

When he saw Bonnell coming back, Wood says he got out of the truck and returned to his car. As he opened the car, the interior light showed the money on the back seat. This prompted him to ask Jeff about it. Following this, they started chasing Bonnell (R2 443).

*Jefferson Doyle*, in testifying as a defense witness in the Wood trial, showed that he was in the Akron bar, when he overheard Vince Cercone mention that Bonnell was dealing in drugs (R2 376). He then decided to get in touch with Bonnell, whose number was obtained through a common acquaintance (R2 377-378).

He recalled telling Wood that, "if you are going down to Steubenville [Ohio], how about taking me and my wife along and drop us off at my sister's house" [in Sharodsville, Ohio, a small town near Dover-New Philadelphia] (R2 379). With this plan set, Doyle called Bonnell, and asked could they get together and do some business. They agreed to meet in Dover (R2 379-380).

Doyle stated he told Bonnell that he did not want Wood to know what they were talking about, because he [Doyle] "knew Woody wouldn't approve" (R2 383). In any event, Bonnell was asked if he [Bonnell] had

any "grass for sale" (R2 384). Doyle indicated to Bonnell that he wanted to buy about two pounds of marijuana, but Bonnell wanted to sell him 10 pounds for $1,000.

Doyle testified his first inclination was that he could raise the money with what he had, what he felt he could get from his sister, and from Woody (R2 384-385).

With that thought in mind, he "took off" for his sister's house (R2 386). After he had gotten two or three miles out of town he changed his mind and started back to the 224 Club (R2 383). Here the record shows the following crucial evidence:

A When I pulled into the Club I * * * flashed my lights so Bill would know it was me * * * and Bill came over to the car with the marijuana and he asked me for the money. I said Bill I hate to tell you this but I can't do it right now – I can't get the money together. If you want to wait a couple days and give me the time to think about it maybe I can. He said, doggone it Doyle, you made a deal to come and I stuck my neck out and I'm here. I said I can't help it, I don't want to do it now. I said I'll buy a pound. I can borrow money off Woody. He said you didn't want Woody to know about it. I said I'll go to the truck and ask him for a loan. He'll give it to me. I'm sure he will. I don't want to use the word he said.

Q He used profanity?

A Yes, and he said profanity and walked away and got in his truck and Woody got out of the truck and came and got in the car.

Q Anything said when Woody got in the car?



A He said where did the money come from?

Q Where was the money?

A In the back seat of the car. I said I don't know. He said he don't know. Where did it come from.

Q Did he say anything about Bonnell throwing something into the car?

THE COURT: Let the witness testify.

THE PROSECUTOR: I am interested in hearing it.

Q Go ahead, Mr. Doyle.

A I think he said – what's that in the car in the back seat and I turned and looked in the back seat and there was money scattered all over the back seat.

Q Then what happened?

A He jumped in the car. I said I don't know. He said did Bill throw that in there? I said I don't know.

Q What did you do after having seen the money in the car?

A I said I didn't throw it in there.

Q What did you do?

A I said Bonnell must have threw it in there. Woody said that son-of- - - - - is trying to frame us or set us up or something that is what he said and I took off to chase after Bill Bonnell.

Q Did you chase Bill Bonnell?

A Yes, sir (R2 388-389).

During the cross examination of Doyle (as a witness in the Wood trial) he was asked with the court's approval why didn't he tell the police Bonnell had set

him up (A 23), and why didn't he "find it in. . . [his] heart" to tell the officers his version of these events (A 23-24). Also, Doyle was asked if he made a statement following his arrest (A 25-26), and "wouldn't that have been a marvelous time to protest. . . [his] innocence" (A 26).

As to all these questions, objections were overruled by the Court, as were various motions for a mistrial.

## IV

In his own defense, Doyle again testified to seeing Vince Cercone in Akron, and hearing him mention that Bonnell was dealing in marijuana (R1 465). He repeated his conversation with Wood and about the arrangements made to drop Doyle and his family off in Sherrodsville (R1 467-469).

He reiterated as to how Bonnell was contacted, and he explained that he had asked Bonnell to *make a sale to him.* According to Doyle this was the purpose for which they agreed to meet in Dover.

In explaining his conversation with Bonnell in Dover, the following testimony was rendered:

A I started talking to Bill and I – about buying some marijuana and he said he had some. I asked him how much, and he said it was $175.00 a pound. If I'd take them all, he'd make me a deal. I believe his first offer was $1200.00 for all of them and I thought about it, then he said maybe he could even do it for $1000.00, and I said, –'I don't know if I can get the money." He said – 'Well, what can you come up with?' I said, – 'I got to go out



and see how much money my wife had' and I was figuring then she had about $130.00 or $140.00. I had Forty some dollars on me and I knew that Woody had some money on him, and I knew that if I asked for it, Woody would trust me to loan it to me because he knows I'd pay him back.

Q Do you know how much money Woody had on him?

A I don't know exactly but I knew it was right around $1,000.00.

Q Then what happened?

* * *

A I was going to go out to my sister's house to see if I could get the money to but all ten pounds. I started out to my sister's. I told Bill, you know, – 'Where can we meet later?' Bill said, – I said, – 'Do you want me to come back here?' He said, – 'No, I'll meet you behind Club 224.' I said, – 'Okay.' So I started out to my sister's and I got to thinking, –'What am I going to do with it?' –you know, with that much marijuana.

* * *

Q So when you came to Dover, you were looking for some marijuana to smoke. Is that right?

A Yes, sir.

Q Now, after, you say that you went out to see if you could get your money at your sister's house, what happened at that point, when you started out to your sister's house?

A I didn't know what I was going to do with that much marijuana.

Q What happened?

A I changed my mind and decided to go back and see if I could buy one pound.

Q Then what happened?

A I turned around and came back.

Q Came back into New Philadelphia?

A Yes Sir.

* * *

Q Tell us what happened when you got back in behind the Club?

A I was sort-of scared and I was looking around and didn't see nobody and Bill came up to the side of my truck, - or my car, – He came from his truck up to the side of my car and he said, – 'Did you get the money?', and I said, – 'I can't get that much money but I only want to buy one pound.' He said, – 'Why did you tell me you wanted it all?' I said, – 'Well, I wanted it all but I don't know what I'm going to do with it and I don't know anybody to get rid of that much to.' He said, – I believe he got upset about it because he said he didn't want – if I only wanted one pound, why didn't I say so, so he'd only brought one pound. Something of that nature. That's how the conversation went. I can't say word for word because I was nervous at the time.

* * *

Q At that point, when you indicated to him you only wanted to buy less than all of this, what did he do? Mr. Bonnell?

A He said, – "Forget it.' He said something else. He was pretty upset about it. Then he went around and got back in his truck.

Q Incidentally, was the window down on your car?



A Yes.

Q The car you were driving?

A Yes Sir.

Q Then what happened?

A He went around and got in his truck and Woody, – I guess at the same time, it seemed like, - Woody came around and got in the car.

Q When Woody got into the car, what do you recall happening?

A That's when Woody asked me what the money was doing in the back seat. I didn't know there was money in the back seat. Apparently, Bill threw it in there. I didn't even know it was there til that time. (R1 470-475).

Distilled, Doyle's direct examination was again to the effect that he had been *framed*. And, that it was because he sensed this to be the case, he then drove through the streets of New Philadelphia looking for Bill Bonnell. It was during this effort they were seen by the police and were arrested.

During his cross examination the prosecutor, with the expressed approval of the Court, asked Doyle if he was innocent. Receiving an affirmative response he then asked Doyle the rhetorical question: "That's why you told the police. . . about your innocence?" (A 10-11.) This question, after the Judge's response to our objection contributed to its prejudicial effect, caused him to reply, "I didn't tell them about my innocence. No", and that neither he nor Wood had told the police they had been set up (A 11).

Not satisfied with these responses, and apparently inspired on both by the Court's apparent unwillingness

to protect Doyle against being penalized for having exercised his rights at the point of arrest, and to further prejudice the defense with the jury, the prosecutor, in his quest for a conviction, pressed on. At this point, he asked Doyle whether the arresting officers had asked him if they could search the car. When given the response that it was not his car, the prosecutor just had to inquire "why [he] didn't consent to a search" of the car (A 11), why he didn't protest his innocence at the time the car was searched, and why he didn't protest his innocence at the preliminary hearing after he heard the accusatory testimony of the officers (A 12-13). Even this is not all, the prosecutor forced Doyle to admit that the first time he (Doyle) had given his version of the facts was during his testimony at the Wood trial (A 13).

*Richard Wood*'s evidence, in the Doyle trial, was again to the effect that he had absolutely nothing whatsoever to do with any transaction between Bonnell and Doyle. Further, that he was, as Doyle had testified, en route to Steubenville to visit his family (R1 444). His evidence, which agreed with Doyle's, was that when he entered the car, behind the club (R1 224), he spotted the money "on the back seat" (R1 450). Following this, he says he gathered it up.

According to Wood's testimony as a defense witness in Doyle's trial, they started chasing Bill Bonnell after Doyle remarked, "he had been had" (R1 451).

Wood, too, was asked if he had told the police he had been set up (A 7). Wood was further examined as to whether he had taken the "witness stand" and told the Judge (at the preliminary hearing) he had been set up (R1 456).



Consider, also, on this same point, the following almost unbelievable segment of the record:

> Q So upon your arrest, you didn't tell anybody you had been 'set up' and why you were chasing Bonnell?
>
> * * *
>
> A No Sir.
>
> Q And you didn't testify in your own defense at the preliminary hearing prior to indictment in this case?
>
> A No Sir.
>
> * * *
>
> Q So the first time you testified as to the facts in this case was at your trial?
>
> * * *
>
> A Yes Sir. (A 9.)

The fact that each of these questions was objected to really magnifies our problem.

## V

In dealing with the specific questions to be considered by this Court under its grant of certiorari, the following rulings by the Court of Appeals are relevant. To petitioners' contention that it was improper to question them as to why they did not "protest their innocence at the point of arrest", the Ohio Court of Appeals concluded:

> "This was not evidence offered by the State in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not

told the same story earlier at his first opportunity.

We find no error in this. It goes to the credibility of the witness" (A 56, 62).

In dealing with the defense contention that it was improper to elicit the fact that Doyle and Wood did not consent to a warrantless search of the car, the Court concluded that:

> "This [too] was not a subject adduced by the State in its case in chief offered as substantive evidence of guilt but rather cross examination of a witness bearing upon the limited purpose of credibility. Concededly, this could not have been shown in the State's case in chief but used as it was here in this stage of the record for this limited purpose it was not error" (A 55-56).

The Court's stated position with reference to the specific question as to the extent a defense witness can be cross examined ruled specifically in these appeals:

> "although the witness (Wood in Doyle's case and Doyle in Wood's case) was not on trial here *he* gave a detailed narrative calculated to exculpate.... He was cross examined in such a manner as to demonstrate he had not told this story at his first or other earlier opportunities... This [the Court held] is proper cross examination bearing upon the credibility of the witness" (A 55).

Having convinced itself that all of these questions were proper, it was an easy decision for the Court to reason that since "the matters were not improperly shown... [they] were not improperly argued to the jury." (A 56 and 65).



## SUMMARY OF ARGUMENT

This case is a patent example of the unwillingness of the Ohio appellate courts to vindicate, at the expense of reversing a conviction, the rights these petitioners had to a fair trial. What really makes this wrong all the more gross here is not the fact that these courts must still be totally oblivious to the thrust even of the relevant opinions by this Court, but rather their apparent proneness to summarily disregard meaningful rights in the process.

It is, of course, perfectly understandable why policemen and prosecutors (doubtless because of their narrow and specialized interest), continually urge that only minimum rights should be extended or protected. And, it is also true that every right achieved, by an individual citizen, represents a diminution of power to the policeman and the prosecutor. But when Courts ratify abuses as clear as those in this case, it can only be because they take a grudging view of the concepts of individual rights– a view so very grudging as to condemn, but for the supremacy of this Court, such rights to ultimate extinction.

In this case, the issue (as to Fifth Amendment rights) could not be clearer. When Wood and Doyle were arrested by the police, only one of two things can be true: *either* the police had the right to extract information from them, *or* Doyle and Wood had a right to remain silent. Both rights cannot be said to have co-existed.

If Doyle and Wood had the right of silence, then it follows they cannot peroperly be penalized for having exercised it. If it were otherwise, then there would be

no reason for any policeman to ever use moderation in his attempt to obtain information from those arrested by him.

The question is properly one for this Court. The issue is what kind of a society do we want. Do we want to penalize those who exercise the rights the Constitution proclaims are theirs, or only some of them. The Court's resolution of the issues in this case will surely chart a course that hopefully will be both clear and precise.

For these, and all of the other reasons set forth below, it is hereby urged that the convictions in these cases should be reversed.

## ARGUMENT

### I.

### THE ASSERTION OF A CONSTITUTIONAL PRIVILEGE OR RIGHT IS NOT PROPERLY PART OF THE EVIDENCE TO BE CONSIDERED BY THE JURY, AND NO INFERENCE CAN BE LEGITIMATELY URGED UPON, OR DRAWN BY, THE JURY AS A CONSEQUENCE OF EITHER THEIR HAVING BEEN ASSERTED BY THE ACCUSED OR A DEFENSE WITNESS.

Perhaps a good starting point here is to interpret, or offer an interpretation of, the Ohio Supreme Court's disinclination to grant these petitioners further appellate review. In a nutshell, the State Supreme Court's judgment, which tacitly approved the Court of Appeals' reasoning patterns, lends itself to the unexpressed



opinion that *Harris v. New York*, 401 U.S. 222 (1971), made inapplicable not only this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but their own decisions in *State v. Stephens* 24 Ohio St 2d 76 (1970); *State v. Minamyer*, 12 Ohio St 2d 67 (1967); and *State v. Davis*, 10 Ohio St 2d 136 (1967).

For surely if *Miranda* were viewed by them as being controlling there is simply no way questions such as "why they [our petitioners] did not protest their innocence at the point of arrest" could have been approved. This is especially so here since the evidence is clear that petitioners were advised not only as to their right of counsel but silence as well. And both elected not to waive these rights.

As to the specific question which asked petitioners why their version of the events was not revealed at the preliminary hearing, in view of the Ohio Supreme Court's decision of *State v. Davis*,[1] it can only be that they were convinced their decision could not survive *Harris v. New York*. The same must have been their view as to *R.C. of Ohio*, §§2937.11 and 2937.12. Of no mean importance here §2937.12, expressly provides, where an accused is not represented by counsel at his preliminary hearing, that the magistrate *shall* advise him:

---

[1] In *State v. Davis*, the Ohio Supreme Court ruled the trial judge's instruction that the jury should disregard entirely the prosecutor's comment on the fact that the accused did not testify at his preliminary hearing "could not correct the error in the aforementioned conduct of the State." (*Id*, 10 Ohio St.2d, at 137).

"* * *

(2) that... [he] may make a statement not under oath, regarding the charge, for the purpose of explaining the facts in evidence;

(3) That he may refuse to make any statement and such refusal may not be used against him at trial."

Then there is the State Supreme Court opinion of *State v. Minamyer.*[2] This case lends itself to the analogy that if it is prejudicial to reveal to a jury that an accused declined to testify before a Grant Jury, it surely must be at least as prejudicial to reveal that these petitioners declined, on comparable grounds, to make a statement at a preliminary hearing. And surely *State v. Stephens,*[3] should have been applied full force to the arguments made by the prosecutor in these cases.

---

[2]In *State v. Minamyer*, our State Supreme Court had held that "to permit a prosecuting attorney to comment upon the refusal of an accused to testify before a grand jury would have... [a] prejudicial effect and to allow such comment would completely circumvent an accused's constitutional privilege against self-incrimination. Therefore, in a criminal prosecution a prosecuting attorney may not testify as to or comment upon the refusal of the accused to testify before the grand jury". (*Id*, 12 Ohio St.2d, at 69). It is also significant that in *Minamyer*, as had been the situation in *Davis*, the Court held the trial court's instruction to disregard this impropriety was insufficient.

[3]The position expressed by the Court in *State v. Stephens*, was directly to the point that an argument which asks "why didn't... [the defendant] tell the police" that his involvement with a forged prescription was innocent "obviously... [had] a prejudicial effect, and to allow such comment would completely circumvent an accused's privilege against self incrimination." (*Id*, 24 Ohio St.2d, at 78).



This brings us back to the decision in *Harris v. New York*, and to this Court's more recent decision of *United States v. Hale*, ____ U.S. ____ (1975).

While the *Hale* analysis seems close enough to the issues here to provide more than token support for our arguments, it would be unrealistic to a fault if we failed to recognize that in *Hale* this Court expressly noted it had "no occasion to reach the broader constitutional question that had supplied an alternative basis for the [D.C. Circuit's] decision below" (*Id*, ____ U.S. ____; Slip Opinion, p. 2).

At least this much seems certain, no issue survives *Hale* as to whether it is proper in a federal criminal trial to compromise the fair trial rights of an accused on the basis of his failure to waive his right of silence. Thus the gut question here is whether the Constitution also requires this same result in state criminal trials.

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that "what the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." The cogency of this principle is, of course, beyond dispute.

The factual background for our contentions shows the petitioner Wood (during his trial) was asked if he told the police his defense when he was arrested (A 28-31); and whether he ever revealed his version of the events prior to testifying at his trial (A 31). All this, as the above references show, was done with the acquiescence and active approval of the trial judge. This is so in spite of the statement, in the trial court's post trial ruling, to the effect that "the court does not agree with the contention that... [Wood] was inquired about his protest of innocence in this matter." (A 43.)

Doyle, as a defense witness in the Wood trial, was asked whether he protested his innocence at the point of arrest (A 26), and whether he ever revealed his version of the events priot to testifying in this trial (A 27). In addition, the prosecutor, with the avid support and sanction of the Court argued all of these points to the jury. (A 37).

During Doyle's own trial, he was asked: [a] if he told the police his defense when he was arrested (A 10-11 and 12); [b] whether he consented to a search of the car (A 11-12); [c] whether he told the Court at the preliminary hearing his defense (A 13); and [d] whether he ever revealed his version of the events prior to testifying in the trial of his co-defendant (*ibid*).

Wood, a defense witness in Doyle's trial, and Doyle in Wood's, were *compelled* to answer, over vigorous and persistent defense objections: [a] whether they protested their innocence at the point of arrest (A 7-8); [b] whether they told the Court at the preliminary hearing their defense (A 8); and [c] whether they ever revealed their version of the events prior to testifying in these trials (A 9).

Also, the record shows, the prosecutor, again with vocalized support and sanction of the Court, argued in both trials most, if not all, of these points to the jury (A 14 and 18; 36-37).

Given the aggressive tenor of the prosecutor's questions, designed to show (as they did) that the petitioners did not either at the point of arrest, or any other time prior to testifying, personally reveal their versions of the crucial events; if it is determined these questions were improper, then there can be no valid contention that they were harmless. In our judgment,



the fact that the trial judge aggressively sanctioned this line of questioning not only magnified the prosecutor's final argument, but also actually compounded these gross abuses of due process.

In *Harris v. New York*, this Court held that an accused's trial testimony could be impeached by proof, inadmissible as a part of the prosecution's case in chief under *Miranda*, which "contrasted sharply with what he told the police officer after his arrest" (401 U.S., at 225). Thus the view gleaned from *Harris*, and apparently seized upon by the Courts below, is that the credibility of an accused can be impeached not merely by his "earlier conflicting statements" (as was the case in *Harris*) but also by his previously asserted right of silence.

It is, of course, significant here that this Court, in resolving conflicting opinions from various circuits, declared, in *United States v. Hale*, that "silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerable prejudicial impact" (*Id*, ____ U.S. ____; Slip Opinion, p. 9).

While this holding was placed in the context of this Court's "supervising authority over the lower federal courts" (*ibid*), it would indeed be an anomaly if the Court's "supervising authority over lower federal courts" were more sensitive to the rights of an accused than is the Court's power as final arbiter of issues raised under the Constitution.

Dealing then with the question as to whether there is a meaningful basis for our contention that the Constitution prohibited not only the questions asked, but the arguments as well; the view as expressed by the D.C. Circuit, in *United States v. Hale*, 498 F 2d 1038

(1974), seems unassailable. Here the Court aptly concluded that this Court's decision in *Grunewald v. United States*, compelled "a finding, as a matter of law, that there was nothing inconsistent between. . . silence in interrogation" (*Id.*, at 1043) and an explanatory defense at trial. As to this expressed position (which is consistent with the one argued by the State below), *Harris v. New York*, 401 U.S. 222 (1971), is said to have sanctioned the forced disclosure that the right of silence, and to counsel, had been exercised.

To begin with, the fact that an accused (even in Ohio) has the right to counsel and the right to remain silent not only following his arrest, but while he is in custody was thought to be beyond dispute. See *State v. Stephens*, 24 Ohio St.2d 76, at 81-82. A necessary corollary of this principle must be that the prosecution may not impermissibly burden, or otherwise penalize, one for having exercised either of these rights. *Griffin v. California*, 380 U.S. 609 (1965). Also see *Johnson v. Patterson*, 475 F.2d 1066 (1975), and *United States v. Nolan*, 416 F.2d 588 (1969).

Given the view, that "prior inconsistent. . . and conflicting statements" obtained in violation of the Constitution (and this would include, as the State sees it, the failure to consent to a search of the car) can be used for the limited purpose of impeachment at the trial; the pivotal question here is whether the assertion of these rights is inconsistent with innocence.

In *Grunewald v. United States*, 353 U.S. 391, 415-424 (1957), this Court *expressly* held that a prior assertion of the right of silence was not inconsistent with a later assertion of innocence (*Id.*, at 423-424). Other cases approving this approach have made the



additional point that an accused cannot be penalized for exercising his right of silence (*Fowle v. United States*, 410 F 2d 48 [1969]), and that a comment on an accused's failure to speak out at the point of arrest, or while in custody operates to punish him for availing himself of the right of counsel. *Fagundes v. United States*, 340 F 2d 674, 677-678 (1965). *Cf.*, *United States ex rel Macon v. Yeager*, 476 F.2d 613 (1973).

Given these holdings, it is apparent that *Harris v. New York* simply does not apply to our petitioners' cases. But even this is not all. Simply holding that *Harris* is inapplicable to these facts is only the short answer. This is so because the position taken by the Ohio Court of Appeals on this point is intrinsically unsound for other cogent reasons, not the least of which is the fact that even if reliance on these rights was inconsistent with innocence, and that such could be shown for the limited purpose indicated by the Court of Appeals, the fact that no limiting instructions were given must be regarded as a factor sufficient to dissipate any harmless error contention that may subsequently surface.

Surely then this Court will maintain its view that silence following an arrest is not inconsistent with innocence, being rather the simple exercise of a right to which all are entitled without qualification. In our view, if this is not the case then the *Miranda* warnings should be changed so as to inform an accused not only that he has the right of silence and to counsel, and that if he waives them anything he says can be used against him, but that if he fails to waive such rights this too can be used against him. *McCarthy v. United States*, 25 F 2d 298 (1928), cited with approval in *United States v.*

*McKinney*, 379 F.2d 259, at 262 (1967). Also see *Gillison v. United States*, 399 F.2d 586 (1968).

On the other hand, even if *Harris* were applicable, and it was proper for the prosecutor to impeach defense testimony by prior inconsistent statements or acts, surely this purpose was not served by questions which ask (these petitioners in their respective cases) the accused if he told police his defense when arrested, why such defense was not revealed at the preliminary hearing (where they appeared with counsel), and why he did not reveal his version of the facts at any time prior to his trial. In our judgment, none of these facts, and the resultant inferences were contradictory to the defense raised or the testimony given.

Despite all this, the rationale of *United States v. Russell*, 332 F Supp 41 (1971), and *United States v. LaVellee*, 471 F 2d 123 (1972), was also offered in the Briefs below, as support for the State's argument. Like the other cases relied on by the State – that is, *United States v. Ramirez*, 441 F.2d 950 (1971), and *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (1973) – these too are inappropriate for consideration here for the reasons given above.

In any event, the Court of Appeals here, without a citation to any authority or precedent (there were two cases cited in the entire Opinion), at least inferentially reasoned that in Ohio our prosecutors are privileged to cross examine the accused "in such a manner as to demonstrate he had not told. . . [his] story at the first or other earlier opportunities." (A 55 and 61). So structured, what the Court must be saying is that even though an accused is advised in accordance with the *Miranda* concept, if he exercises any of the options



given him, save and except making a statement, he does so at the peril of being impeached thereby should he ever testify.

We contend not only that it was violative of due process to allow these questions and the resultant inferences; it also violated "elementary fairness." See *Johnson v. United States*, 318 U.S. 189, at 197 (1943). The same is true of the arguments and comments made by the prosecutor in his successful quest for these convictions. See *United States v. Nolan*, 416 F.2d 588 (1969).

## II.

As to the contention made by these petitioners that it was improper to question their defense witness as to why "he did not protest his innocence earlier than at the trial. . . [and for the prosecutor to then] argue this point to the jury"; the position taken by the Ohio Court of Appeals was that such questions were proper as bearing "upon the credibility of the witness" (A 55), and its use for such "limited purpose" was not error (A 55-56). It was also that Court's view these matters "were not improperly argued to the jury" (A 8).

The trial court, in denying petitioner Wood's post-trial motion for judgment of acquittal, expressed the conclusion that "there are different rules that apply to a witness than to a defendant" (A 42). While this is doubtless true, it is likewise true that any distinction as to the propriety of these questions based on whether they were addressed to the accused *or* to his witness (if the arguments made above are valid) simply cannot

survive Constitutional scrutiny. For surely it must be that having indicated to the witness that he too would not be penalized if he chose to remain silent the right of the accused to the benefit of such witness' evidence should not be impermissibly weighted, or otherwise compromised, by any resultant right of the State to disclose to the jury the fact that these Constitutional rights were exercised.

Viewed from still another posture, the outer limits right to impeach, by showing prior inconsistent conduct, is the same. This is so, in our judgment, whether the person whose evidence is sought to be impeached is the accused or merely his witness. Hence, the apt test, as to whether a mere witness' silence was inconsistent with his trial testimony involves a consideration of the same factors that would apply to the accused. *People v. Storr*, 527 P.2d 878 (Colo. 1974). Thus, it should suffice here simply to say that silence under the facts here as well as a refusal to consent to the search of the car; whether such silence, or refusal, was exercised by the accused as the accused, or as a witness creates congruent inferences.

For these reasons, and based on the arguments made above, the contentions made here are submitted as being controlling. Further (and for the same reasons), this Court should feel compelled to declare that the Constitution forbids the prosecution from improperly using, to the State's advantage, the fact that a witness (whose right to avail himself of counsel and of the privilege against self incrimination is equal to that of an accused) elected to stand on such rights until called upon to testify.



## CONCLUSION

The convictions here seem so obviously to be based prejudicial inferences, which were created and urged upon jury as valid contentions. On the other hand, while the various rulings made below fail to supply even a logical position for their vindication, the decision of *United States v. Hale, supra*, to which critical reference has been made, should be determinative. If not this, then the conclusion expressed therein should be viewed as also being required by the Constitution.

## RELIEF

For all of the reasons argued above, the judgments here under review should be reversed and these cases remanded to the Ohio Court of Appeals for the appropriate dispositions.

Respectfully submitted,

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